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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 628

TEXACO INC., PAN AMERICAN PETROLEUM CORPORATION AND GULF OIL CORPORATION,

Petitioners,

v.

FEDERAL POWER COMMISSION, THE BROOKLYN UNION GAS COMPANY, LONG ISLAND LIGHTING COMPANY, PHILADELPHIA GAS WORKS DIVISION OF THE UNITED GAS IMPROVEMENT COMPANY AND PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondents.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CITATIONS

CASES:

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STATUTE:

Natural Gas Act, Sections 7 and 19, 52 Stat. 824, as amended by 56 Stat. 83, 15 U.S.C. §§ 717-717w 3

MISCELLANEOUS:

Statement of General Policy No. 61-1, 18 CFR 2.56(a) 24 F.P.C. 818 (1960) 3

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Petitioners Texaco Inc., Gulf Oil Corporation and Pan American Petroleum Corporation (Cross-Petitioners) petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on May 24, 1967,[1] the writ to issue, however, only in the event that this Court grants *both* (1) the petition for certiorari in No 520, *and* (2) at least one of the pending petitions for certiorari which raise the issue of the Federal Power Commission's (Commission)

[1] The timeliness of the filing of this conditional cross-petition, under the circumstances here presented, is analyzed, *infra*.

authority to retroactively impose a refund condition upon amounts previously collected pursuant to a lawfully issued temporary certificate.[2]

OPINIONS BELOW

The opinion and judgment of the Court of Appeals is reported at 378 F. 2d 510. The opinion and order of the Federal Power Commission is reported at 34 F.P.C. 1001, rehearing denied, 34 F.P.C. 1367.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition in No. 520.

QUESTION PRESENTED

If the court below erred in upholding the Commission's finding that the appropriate in-line certificate price was 16¢ per Mcf (as contended by distributor-petitioners in No. 520), then Cross-Petitioners are subject to a potential refund obligation of amounts collected under temporary certificates equal to the difference between 16¢ and any lower in-line price which may be established.[3] This potential refund exposure results from the lower court's holding which is the subject of the petitions in Nos. 504 and 526, this Term, and gives rise to the following question, conditionally presented by this cross-petition:

> May the Commission retroactively order refunds of amounts collected under lawfully issued temporary

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[2] To the best of our knowledge, these Petitions are Nos. 60, 61, 62, 80, 97, 227, 415, 503, 504, and 526, October Term, 1967.

[3] The sale by Pan American Petroleum Corporation to Valley Gas Transmission, Inc., certificated in FPC Docket No. CI63-1263, provides for a contractually authorized price of 15.5¢ per mcf and only this amount was collected during the period of temporary authorization.

certificates when, pursuant to legal precedent and its established policies, the Commission determined at the issuance of such certificates, that no refund liabilities should be imposed?

STATUTES INVOLVED

Pertinent provisions of Sections 7 and 19 of the Natural Gas Act are set forth in the Appendix.

STATEMENT

Cross-Petitioners applied for temporary certificates of public convenience and necessity authorizing the sale of gas in interstate commerce pending a hearing on their applications for permanent certificates. Temporary certificates were issued authorizing the collection of initial prices of up to 16¢ per Mcf without refund condition. The initial prices collected by Cross-Petitioners during the period of temporary authorization were within the area guideline price level established in the Commission's *Statement of General Policy No. 61-1,* 18 CFR 2.56(a), 24 F.P.C. 818 (1960).

The applications for permanent certificates to cover these sales were consolidated with other applications for permanent certificates filed by other producers. After the statutory hearing, permanent certificates of public convenience and necessity were issued to Cross-Petitioners authorizing the sale of gas in interstate commerce at the initial prices of up to 16¢ per Mcf collected during the period of temporary authorization. The Commission rejected the contention of certain distributor intervenors (Petitioners in No. 520) that the appropriate in-line certificating level should be 15¢ per Mcf. Consequently, Cross-Petitioners were not aggrieved by the lower court's holding affirming the Commission's decision in other consolidated dockets that the Commission had the authority to retroactively order the refund of any amounts collected in

excess of the 16¢ per Mcf permanent certificating level under temporary certificates containing no refund condition. Cross-Petitioners, therefore, had no basis for petitioning this Court for review of such holdings by the Court of Appeals. *Public Service Commission* v. *Brashear Lines,* 306 U.S. 204, 206 (1939).

The petition for writ of certiorari filed in No. 520 seeks a review of the Commission's 16¢ per Mcf in-line price. If such a review is granted and the Commission's determination is reversed, then — and only then — will the Commission's assertion of retroactive refund authority result in any aggrievement of these Cross-Petitioners.

REASONS FOR GRANTING THE WRIT

The petition for certiorari in No. 520, which prompted this conditional cross-petition, was not filed until August 21, 1967, only one day before the expiration of the 90-day period prescribed by 28 U.S.C. § 2101(c). Cross-Petitioners did not file a petition for writ of certiorari or even a conditional petition for writ of certiorari within the initial 90-day period for the reason that they do not challenge the Commission's 16¢ per Mcf in-line determination and were not aggrieved by the order of the court below. It was not until after the filing of the petition in No. 520 reopening the price line issue that any possibility of aggrievement to these Cross-Petitioners arose. Only in the event that certiorari is granted on the price line issue and that issue is resolved in favor of the lower price level urged by the Distributor interests will Cross-Petitioners' sales be affected by the Commission's asserted retroactive refund authority. This conditional cross-petition is filed to insure that we are not deprived of the opportunity to seek reversal of the Commission's refund holding in the event that this Court grants Distributors' petition in No. 520,

and one of the pending petitions in Nos. 60, 61, 62, 80, 97, 227, 415, 503, 504 and 526 to review the Commission's refund holding.

No jurisdictional issue is presented by this filing since the necessary jurisdictional requisites for this Court to review the decision below have been met by the filing of the petition in No. 520 within the 90-day statutory period. Moreover, the holding of the court below on the issue conditionally raised here is the subject of two pending petitions for certiorari (Nos. 504 and 526), both filed within the 90-day statutory period. Thus, if this Court decides to review the refund issue, the granting of this conditional cross-petition will not enlarge the issues raised by the court below which are already encompassed in pending petitions for certiorari.

TIMELINESS OF CONDITIONAL CROSS-PETITION

The filing of a conditional cross-petition within the time permitted for filing a brief in opposition to the petition conforms to the procedure approved by this Court in *Ray, et al.* v. *Robert Pierson, et al.*, No. 1155, October Term 1965, certiorari granted, 384 U.S. 938. That case involved a civil action for damages on which the judgment of the court of appeals was entered October 25, 1965. Robert L. Pierson, *et al.* made timely applications for, and received, an extension of time within which to file for a writ of certiorari until February 28, 1966, on which date their petition was filed. J. L. Ray, *et al.* did not apply for an extension of time in which to file a cross-petition and after both the initial statutory 90-day period and the extension period granted to Pierson, *et al.* expired, Ray, *et al.* filed on March 26, 1966, a cross-petition for writ of certiorari seeking review of a question not raised in the Pierson petition. On May 16, 1966, both the petition for writ of certiorari in No. 1074

and the cross-petition for write of certiorari in No. 1155 were granted. 384 U.S. 938.

This conditional cross-petition is also contingent upon this Court's granting one of the petitions for certiorari seeking review of the Commission's assertion of a retroactive refund power. As noted in the Briefs in Opposition in Nos. 60, 61, 62, 227 and 415, this Term, the refund issue does not warrant review by this Court. It is only in the event that this Court determines that such review is warranted and grants one of the pending petitions raising this question that this conditional cross-petition on this same issue should likewise be granted.

In the event the Court deems that an extension of time must be granted in order to accept this cross-petition for filing, Cross-Petitioners ask for a 30-day extension of the 90-day period within which to file this conditional cross-petition for the reasons set forth herein.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that if the Court grant the petitions for writ of certiorari in No. 520 and any of the petitions for writs of certiorari with respect to the refund issue currently pending before the Court in Nos. 60, 61, 62, 80, 97, 227, 415, 503, 504 or 526, then it should also grant this conditional cross-petition for writ of certiorari. In the event such a request is deemed appropriate, the undersigned respectfully requests that the Court grant a 30-day extension within which to file the foregoing conditional cross-petition.

Respectfully submitted,

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APPENDIX

Natural Gas Act

Section 7(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f(b)]

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amenda-

tory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)].

* * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder; and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission

shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)]

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Section 19(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of

the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).